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IN THE

Supreme Court of the United States

October Term, 1952

No. 560

LOVE TRACTOR, INC.

Petitioner,

vs.

CONTINENTAL FARM EQUIPMENT CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on October 22, 1952.

OPINION BELOW

The opinion of the Court of Appeals (R. 602) is reported in 199 F(2) 202.

JURISDICTION

The judgment of the Court of Appeals was entered on October 22, 1952. (R. 608) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the issuance to respondent, on December 14, 1943, of patent No. 2,336,884, on an application filed on July 8, 1942, for a Hydraulic Disk Frame accused of infringing petitioner's patent for Disk Harrow, No. 2,320,624, issued June 1, 1943, on an application filed July 7, 1941, strikes down the charge of infringement of petitioner's patent No. 2,320,624 by respondent, on the theory that respondent's said subsequent patent is entitled to a compelling presumption of validity but cannot be good and the device it describes be at the same time an infringement of petitioner's earlier patent.

2. Whether a Court of Appeals may properly disregard evidence, substantially contemporaneous with the invention of the patent in suit, that respondent's president and others skilled in the art deemed the combination and arrangement of parts of the patented disk harrow to be new and unobvious, and evidence that the patented disk harrow accomplished results desired but never previously realized in the art, by setting aside findings of fact supported by such evidence and substituting therefor its after-the-fact opinion that the patented disk harrow had been simply and easily made.

STATUTES INVOLVED

Petitioner's action for infringement is predicated on the patent laws of the United States, 35 U.S.C. 70.

STATEMENT

Petitioner is the owner of Love patent No. 2,320,624 (R. 417) relating to a disk harrow which is liftable bodily

above and clear of the ground by a tractor-mounted lift hitch mechanism of the type having three points of connection with the harrow, said harrow being adjustable to regulate the depth of penetration of the ground by its disk blades and being flexible or floatable to follow the contour of the ground engaged by the disk blades.

The harrow includes a main frame with a forward projection and a superstructure, three connectors on the frame and superstructure for connection with said lift hitch, two or more gangs of disk blades mounted on a common axis and including spaced bearings and a gang frame, means pivotally connecting the outer ends of the gangs to the main frame at the gang bearings and at a second point spaced above the bearings in a manner to permit horizontal adjustment and limited vertical tilting of the gangs, and adjusting means including links connected at the inner ends of the gangs and extending to manually controlled means carried by the forward projection of the main frame.

In an action for infringement of this patent the District Court held claims 2, 3, 6, 7, 10 and 11 to be valid and infringed by Respondent.

The Court of Appeals reversed the District Court and struck down the claim of infringement and refused to sustain the validity of the patent.

On the issue of infringement, the decision of the Court of Appeals is in square conflict with the decision of this Court in Graver Tank Co. v. Linde Air Products Co., 339

U. S. 605, 607, and with its own prior decision in Wisconsin-Minnesota Gas & Electric Household Appliance Co. v. Hirschy Co. 28 (F2) 838, 846 (1928).

In ruling on the issue of validity of the patent in suit, the Court of Appeals refused to give any weight to evidence of the opinions and statements of respondent's president and others skilled in the art concerning the new and unobvious nature of a liftable disk harrow, which statements were substantially contemporaneous with the invention of the patent in suit. Instead, the Court concluded that there was no adequate evidence or support for the trial court's finding of validity of petitioner's patent. The decision of the Court of Appeals on the issue of validity is in square conflict with the decision of the Court of Appeals for the Seventh Circuit in James Heddon's Sons v. South Bend Bait Company, 15 Fed. (2) 805, 807 (1926).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

(1) In reversing the findings of the District Court on the question of infringement;

(2) In reversing the findings of the District Court that claims 2, 3, 6, 7, 10 and 11 of petitioner's patent are valid; and

(3) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals on the issue of infringement fails to give proper effect to the Court's

decision in Graver Tank Co. v. Linde Air Products Co., 339 U. S. 605 (1950). If that decision is not applicable, then the Court of Appeals has passed on an original question which is clearly of sufficient importance to be settled by this Court. The question is properly here for review.

Each of claims 2, 3, 6, 7, 10 and 11 of the patent in suit (R. 421) defines a disk harrow with respect to both the construction and arrangement of the various parts of which it consists. Thus the claims define the frame of the device and its particular construction and characteristics, the relation of connectors to the frame parts, the various disk gangs and their construction and sub-components and the connection thereof to the frame, and the adjusting means of the device and its relation to the frame and the disk gangs.

The trial court found infringement of petitioner's patent by the manufacture by respondent of a single-action lift disk harrow. Finding 12 (R. 23) of the District Court stated:

> "The defendant has manufactured in this District and sells a single-action lift disk harrow which is constructed similarly to the patented harrow, embodies the same combination and arrangement of parts as the patented harrow, accomplishes the same results as the patented harrow, and in the same way, and possesses all of the advantages which characterize the patented invention."

The Court of Appeals ruled on the issue of infringement without in any way discussing the claims of the

patent or the combination and arrangement of parts defined by the claims. Nor did the Court of Appeals discuss the manner in which the results of the patented and accused harrows were accomplished and the identity of operation and advantages of both the patented and the respondent's harrow. Instead, the Court advanced the distinctly novel proposition (R 606) that, because the respondent had a patent which was presumptively valid, and because that presumption could not stand and at the same time the respondent's accused device covered in that patent be held to be an infringement, the claim of infringement of petitioner's patent must be stricken down.*

It is submitted that this ruling cannot be reconciled with long and well established principles laid down by this and other courts that

> "In determining whether an accused device or composition infringes a valid patent, resort must be had in the first instance to the words of the claims. If accused matter falls clearly within the claim, infringement is made out and that is the end of it."
> Graver Tank Co. v. Linde Air Products Co.,
> 339 U. S. 605, 607.

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*The specific words (R. 606) of the Court of Appeals on this issue are: "And in this case if we give to the subsequent issuance of defendant's patent on its accused device a compelling presumption of validity, to do so would strike down plaintiff's claim of infringement. Because defendant's patent cannot be good and the device it describes be at the same time an infringement of plaintiff's previously patented device."

Also, the ruling is a reversal of a previous ruling of this Court of Appeals on the same issue.*

The effect of the ruling of the Court of Appeals in this case is to establish an entirely new standard for determining whether or not infringement of a patent exists. This new standard completely disregards the claim of the patent in suit which the statutes (35 U.S.C., Sec. 31) require as a part of a patent; and disregards the grant by the patent of the exclusive right to make, use, and vend the invention referred to in the specification and claims of the patent (35 U.S.C. 40).

The far-reaching significance of the ruling of the court below is also manifested when its effect on thousands of patentees is considered. The Court of Appeals would apparently deny any patent protection to the owner of a patent against infringement by another who secured a patent upon some modification of the device of the prior patent. In other words, it would appear to dispense with and repudiate the theory that a dominating patent may exist in an art. The effect of such a decision would be to lower the flood gates to an endless stream of commercial and industrial piracy and would vitiate almost completely the value of a patent to its owner, regardless of the merits and virtues of the invention covered by that patent. A ruling of this general importance clearly calls for the exercise of this Court's discretionary certiorari jurisdiction.

2. The decision of the Court of Appeals that evidence that respondent's president and others skilled in the art

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*See: Wisconsin-Minnesota Gas & Electric Household Appliance Co. v. Hirschy Co., 28 F(2d) 838, 846 (1928) C. A. 8.

regarded a liftable disk harrow to be new and unobvious and to accomplish results previously sought but not realized in the art may be disregarded because the Court deemed that the patented device was simply and easily made, is in direct conflict with the rule applied in the Seventh Circuit that one accused of infringement may himself furnish a yard stick for measuring the skill of a man trained in the art.

The Court of Appeals refused (R. 606) to accept the respondent's opinion (R. 343) on the question of the patentability of the accused harrow which accomplishes the result of liftability, adjustability and floatability for disks in substantially the same manner as the Love patent, as expressed when respondent's president sought a patent on the accused device.

The Court of Appeals also refused to accept the opinion of the trial court (R. 28) that

> "Other evidence which further verifies the fact that the Love disk harrow was patentable is that given by Mr. Hammons, who testified that despite a lifetime of familiarity with farm implements, when he first saw the Love lift disk harrow, he did not believe it was a practical tool, and caused extensive tests to be made to satisfy himself that it was practical. Then, Mr. Love testified concerning the reluctance of other dealers to approve or purchase his patented harrow when it was first introduced. Would this seem to indicate that the invention was obvious to those skilled in the art? We think not."

Other items which the Court of Appeals disregarded were

(a) The statements urging that the harrow be patented, such as Ex. Z-11 (R. 546), Ex. Z-22 (R. 553), made by Mr. Harry Ferguson, who was the father of the three-arm power-operated lift hitch mechanism for farm tractors and who designed various improvements for it (R. 424-425);

(b) The Burch license agreements, Ex. AA-1 and Ex. AA-6 (R. 558-566); and

(c) The concise statement of the trial court (R. 25)

> "The plaintiff's lift disk harrow is the first harrow so constructed that it can be lifted, adjusted, and at the same time be floatable; that is to say, so that its disk blades may follow the contour of the ground. The *teachings of the art previously* had been that, *if liftability was to be secured, then floatability had to be sacrificed.* In other words, the Love disk harrow produces a new and useful result." (Emphasis ours)

In this decision the Court of Appeals has rejected the long standing test that an invention must be judged against the background of the history of the art and the skill and judgment of workers in the art at the time the invention was made.

In rejecting this test in the present instance, the Court of Appeals is in sharp conflict with the decision in the Seventh Circuit in James Heddon's Sons v. South Bend Bait Co., 14 (F. 2) 805, 807 (1926) which stated:

> "The ken of the man 'skilled in the art' is not easy to define in many cases, but fortunately, in this case, appellee has furnished itself as the yardstick

> for measuring the skill of this man so trained in this art. It has demonstrated that Dill's bait and Dill's process represented something more than mechanical skill."

In another particular, when the Court of Appeals rejected the usual test because it deemed the production of the disk harrow of the patent in suit "was simply and easily done" (R. 607), it is in sharp conflict with the decision in the Second Circuit in Refractolite v. Prismo, 117 F. (2) 806, 807 (1941) which stated:

> "Nothing is easier in patent litigation than to confuse a trifling physical change with the ingenuity required for its discovery * * *"

The decision of the Court in this case is of great public interest and especially of great interest to patent owners whose patents are infringed in the Eighth Circuit. If this decision is permitted to stand, patent owners in such cases can expect to lose the benefit of long standing principles of patent law in judging the question of the existence of invention as it relates to their patents. They can look forward to disregard of the presumptions of validity of their patents, but can expect the application against them of presumptions favoring the validity of subsequent patents on defendants' improvements of their patented inventions. They can expect disregard of findings of validity made by trial courts after observing witnesses, who, like Mr. Hammons (R. 59-72), testify about the prior art and the reception of the patented invention and who testify about what they thought

and stated under oath about the novelty and patentability of a device like the patented device, as did Mr. Cruse (R. 343).

The observance of a uniform standard for judging the existence of invention in patented devices, and the assurance that courts will apply consistent reasoning and give due regard to admissions and other pertinent evidence, are important to all inventors, patent owners, stockholders in businesses operating under patent rights, and to the public generally. It is important that this Court supply standards which will lead to reasonable appraisal of patents consistent with the intent and meaning of the patent statutes.

It is further important to the public in the light of the new patent statutes which took effect January 1, 1953, of which 15 U.S.C. 100, states:

> "A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the *subject matter as a whole* would have been obvious *at the time the invention was made to a person having ordinary skill in the art* to which said subject matter relates. Patentability shall *not* be negatived by the *manner* in which the invention was made." (Emphasis ours)

Here the evidence was clear and unmistakable that the liftable disk harrow was *not* obvious at the time the invention was made. That evidence was given directly or secured from contemporaneous records, and came from many sources

and from persons skilled in the art relating to disk harrows and other agricultural implements. Patent owners and the public are entitled to judicial pronouncements consistent with the standard of judgment long applied by the courts and recently confirmed by Congress, as to what constitutes an invention. The failure of the Court of Appeals to apply such a standard merits the exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 560

LOVE TRACTOR, INC.,
Petitioner,
vs.
CONTINENTAL FARM EQUIPMENT CO., INC.,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Petitioner's Question No. 1 is based upon the false premise that the Court of Appeals ruled on the question of infringement of petitioner's patent. No such ruling was made, but in fact, the Court disposed of the case solely and entirely on the ruling that petitioner's patent is invalid

for want of invention. Thus, any language of the Court on the subject of infringement, albeit erroneous, is mere dicta, not establishing any rule of law and not controlling in any subsequent suit. *Cohens v. Virginia,* 6 Wheat 264, 399; 5 L. Ed. 257, 290. The question therefore has no substance.

Petitioner's Question No. 2 presents no question of law. The decision of the Court of Appeals in no way conflicts with the decision in *James Heddon's Sons v. South Bend Bait Co.,* 14 F. 2d 805. The ruling that Petitioner's patent lacks invention resulted from a strict and correct following by the Court of Appeals of the standards prescribed by this Court for determining invention in a combination of old elements. *The Great A. & P. Tea Co. v. Supermarket Equipment Corp.,* 340 U. S. 147; 95 L. Ed. 162.

Petitioner presents no more than the case of a defeated litigant attempting to create grounds for the further review of its case by this Court.

FOREWORD

A brief analysis of the entire opinion of the Court of Appeals and the fundamental facts of this litigation will clearly show that the two questions presented by Petitioner have no sound basis and present no special and important reasons why review should be granted.

ARGUMENT

1. PETITIONER'S QUESTION No. 1 IS BASED UPON A FALSE PREMISE.

Respondent, in presenting its appeal from the judgment of the District Court, contended *inter alia* that:

A. The Love patent No. 2,320,624 was invalid because:

1. Its subject matter consisted in the combination of a number of old elements each of which functioned no differently in the combination than they had in the prior art and that therefore the patent failed to meet the standard of invention laid down by this Court for combination patents in the *A. & P.* case;

2. The claimed subject matter of the Love patent was found in a disk harrow publicly used more than one year prior to the filing date of Love's patent application; and

3. The patent did not sufficiently describe and claim the invention which petitioner contends it contains.

B. If the patent were found valid over the above defenses, then, if its claims were properly interpreted, the respondent's structure could not be found to be an infringement.

Petitioner's question No. 1 is based upon the false premise that a ruling on the question of infringement was made by the Court of Appeals. If no such ruling was made, then its opinion does not strike down petitioner's charge of infringement "on the theory that respondent's said subsequent patent is entitled to a compelling presumption of

validity but cannot be good and the device it describes be at the same time an infringement of petitioner's earlier patent" (P. 2).

The exact statement of the Court from which petitioner has constructed the foregoing "theory" is:

> "And in this case if we give to the subsequent issuance of defendant's patent on its accused device a compelling presumption of validity, to do so would strike down plaintiff's claim of infringement. *Because defendant's patent cannot be good and the device it describes be at the same time an infringement of plaintiff's previously patented device.*" (R. 606). (Emphasis ours.)

Clearly, this language of the Court is an egregious misstatement of law—so glaringly erroneous as to be immediately recognized as such by anyone having a rudimentary knowledge of patent law.

Albeit erroneous, the statement forms no basis for any matter decided by the Court of Appeals, but was clearly, in effect, a parenthetical observation thrown in as a "make weight" in the middle of the Court's discussion of the question of invention and the *A. & P. Tea Co.* decision (R. 606). This is apparent from a mere reading of the Court's opinion. Paragraph two of that opinion (R. 603), in which the Court begins its discussion of the issues, starts with the following sentence:

> "*The principal question for decision is the validity of plaintiff's patent.*" (Emphasis ours.)

The Court's entire discussion is directed to the decision of that question.

On R. 605, the Court, after discussing Love's conception of

> "the idea of making a disc which would have both the adjustability and floatability of the old discs, and also be liftable, like plows and other rigid implements."

stated:

> "The principal problem to overcome in order to accomplish this was to so devise the disc as to permit it to be lifted without having the movable inner ends of the section sag down and not leave the ground when the implement was lifted. He accomplished that result. But was its accomplishment the result of inventive genius or by merely the application of mechanical skill? *That is the crucial question.*[1]" (Emphasis ours.)

The footnote [1] mentions respondent's contention (A-3) above but states:

> "*we pass that question to reach the question of invention.*" (Emphasis ours.)

On the same page, the Court briefly refers to respondent's contention (A-2) above saying:

> "but since we will not reach that question if the Love patent be found invalid for want of invention, we lay (R. 606) aside for the present the question of the possible legal effect of prior use of such a device."

Finally the Court concluded by stating (R. 608):

> "Hence, we fail to find adequate evidentiary support for the trial court's finding of invention. The validity of the patent cannot be sustained under those circumstances.
>
> "Having reached the conclusion stated, the other questions presented become immaterial."

The Court of Appeals therefore having made no ruling nor determination of the question of infringement, did not

"strike down" the charge of infringement on any such "theory" as stated in Petitioner's question No. 1, but having found the patent invalid for want of invention, unequivocally ruled that this question, as well as the other questions presented, became immaterial.

Therefore, the erroneous statement of the Court on the subject of infringement is nothing but mere dicta. Petitioner's question No. 1 is clearly based upon a failure to comprehend that no ruling was made or based upon the fallacious "theory" against which petitioner inveighs so vigorously and for which it predicts such dire consequences (P. 7). Petitioner's discussion is but a quixotic tilting with windmills since it fails to take due cognizance of the fundamental principle that dicta which goes beyond the case or point decided cannot control in a subsequent suit where such point is presented for decision. This was clearly stated as follows by Chief Justice Marshall in *Cohens v. Virginia,* 6 Wheat 264 at page 399; 5 L. Ed. 257, 290:

> "The counsel for the defendant in error urge, * * *, some *dicta* of the court, in the case of *Marbury v. Madison.*
>
> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Erroneous dicta is not erroneous law. Hence, Petitioner's question No. 1 prompts the more pertinent query—may the time and dignity of the Supreme Court of the United States be encroached upon to the point of calling upon it to exercise its appellate powers to act as editor or proofreader of the decisions of the lower courts to insure that no erroneous dicta has crept into those decisions?

2. PETITIONER'S QUESTION No. 2 PRESENTS NO QUESTION OF LAW BUT IS MERELY AN EFFORT OF A DEFEATED LITIGANT TO OBTAIN A REVIEW OF THE QUESTION OF INVENTION PROPERLY DECIDED BY THE COURT OF APPEALS IN STRICT ACCORDANCE WITH THE STANDARDS ESTABLISHED BY THIS COURT.

Petitioner's second question is in reality no more than a request that this Court review the decision of the Court of Appeals holding its patent invalid. It is lacking in merit and substance because:

A. The alleged conflict with the decision of the Seventh Circuit Court of Appeals in the case of *James Heddon's Sons v. South Bend Bait Co.*, 14 F. 2d 805, does not exist; and

B. The standard applied by the Court of Appeals in this case in determining that the patent in suit resulted from the exercise of mechanical skill, not inventive genius, was not a departure from the standard of invention required by existing law. Instead, the Court of Appeals directly followed the standard long required by decisions of this Court in cases where a patent involves a combination of old elements, and reaffirmed by this Court in *The Great A. & P. Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147; 95 L. Ed. 162.

A. There is no conflict of decision.

Petitioner labors to make it appear there is "a conflict of decisions" by extracting a statement from the opinion of the Seventh Circuit Court of Appeals in the *South Bend Bait* case, without supplying the factual background which gives that statement meaning and vitality. Let us compare that case with the present case, making that comparison with the thought in mind that in each case the question before the Court is whether there is evidence to show that the step taken by the patentee amounted to more than ordinary mechanical skill.

In the present case, respondent's president independently developed a disk harrow. He applied for and was granted a patent which we shall assume for the purpose of this discussion covered a disk harrow which accomplished the same results as did the disk harrow forming the subject matter of petitioner's prior Love patent. Petitioner contends that this is evidence that the Love patent resulted from more than mechanical skill, and further asserts that the Court of Appeals disregarded this evidence. The Court did not disregard, but directly discussed this subject as follows (R. 606):

> "Therefore, as plaintiff says, the defendant is a good witness for the patentability of plaintiff's similar device, *if we could accept defendant's opinion on the question of patentability.* The opinion of the Patent Office is entitled to and given great weight on the question of the validity of patents issued and the necessary attributes of patentability, including invention. Yet in the final analysis, *invention is a question for the courts ultimately to decide. A. & P. Tea Co. v. Supermarket Corp.*, 340 U. S. 147." (Emphasis ours.)

This is fundamental patent law correctly and concisely stated. The Courts have never accepted as a finality the opinion of the Patent Office on the question of invention, let alone the opinion of an individual reflected by his filing of a patent application, as conclusive evidence on this question. Nor have they accepted the opinions of others as to patentability, or commercial success, or acceptance of licenses as substitutes for invention in cases where invention is clearly lacking.

In the *South Bend Bait Co.* case the question was whether more than mechanical skill was involved in the patented process for reproducing fish scales on artificial bait. Defendant wrote plaintiff a letter asking for information on how the process was effected. Later, after having infringed the patent, defendant contended that the process was no more than mechanical skill. Obviously, had this been the case, there would have been no need for defendant to have written for the information. It could have figured the process out for itself. Hence, the Court's statement quoted by petitioner (pp. 9, 10) that this demonstrated that the patented process represented something more than mechanical skill.

B. The standard prescribed by this Court for determining invention in a combination of old elements was followed.

Petitioner complains that the Court of Appeals "refused to accept the opinion of the trial court" in finding invention, "disregarded" certain items of evidence which it claims evidence invention, and "rejected the long standing test that an invention must be judged against the background of the history of the art and the skill and judgment of workers in the art at the time the invention was made." Actually, the Court's opinion (R. 606-608) shows that it

did not "refuse to accept," did not "disregard," did not "reject" anything. It considered all the factors entering into the determination of the question of invention—commercial success, novelty, utility, imitation by those skilled in the art, the practical satisfaction of a need long recognized, and even heeded the danger zone of hindsight which formed the basis for the statement extracted from the case of *Refractolite v. Prismo,* 117 F. 2d 806, for the construction of petitioner's other erroneous instance of alleged conflicting decisions.

Having considered all these factors, the Court of Appeals here simply concluded, "Hence, we fail to find adequate evidentiary support for the trial court's finding of invention."

Throughout this litigation, petitioner has stoutly maintained that its patented disk harrow was the first to combine the principles of liftability, adjustability and floatability. These results had been achieved individually and in various subcombinations in prior art disk harrows by structural means similar to those employed by the patentee. These structural elements were variously defined in the claims of the Love patent.

We contended that these claims define the type of thing that has come to be called an "aggregation" in the patent law, not a patentable combination, and that under the rule of law laid down by this court in a long line of cases, through *Cuno Engineering Corp. v. Automatic Devices Corp.,* 314 U. S. 84; 86 L. Ed. 58, claims of this type did not define an invention where the result of the combination was the sum of the old results of each of its component elements.

Subsequent to the decision of the District Court in this case, this Court handed down its decision in the *A. & P.* case. The *A. & P.* decision serves to further clarify the

distinction in patent law between an inventive combination of old elements and the aggregative combination resulting from mechanical skill. The *A. & P.* decision pointed out that for there to be invention in a combination of old elements, there must be a finding that the elements perform some additional or different function in the combination than they had previously performed out of it. Otherwise, the combination is not the result of invention, but simple skill—mere deductive reasoning in adding two and two to make four. Here the patentee Love added elements giving the function of liftability to elements giving the function of adjustability to elements giving the function of floatability. He naturally ended up with a disk harrow that was liftable, adjustable and floatable, and on this point the Court of Appeals found:

> "While the result of combining all three principles made the implement more useful in that it was adjustable and floatable or flexible and could be lifted and carried by the tractor, yet the combination of the three known principles resulting in the better use of their functions *created no change in their respective functions.*" (R. 607). (Emphasis ours.)

The Court of Appeals further found that the combination of these three known principles involved no great mechanical problem, and therefore could not help but conclude otherwise than that the step taken by the patentee Love was one of mechanical skill, not invention. This conclusion was a direct and proper following of the rule of the *A. & P.* case.

Petitioner seems to be attempting to have this Court reconsider that rule in view of the Patent Act of 1952 (15 U. S. C. 100). That section of the new patent law is in effect a restatement of the law of the *A. & P.* case that a patent

may not be obtained for subject matter resulting from the exercise of ordinary skill of the art. It contributes nothing to the problem of determining whether the subject matter of a patent represents an advance of more than ordinary skill over the prior art. What is ordinary skill is not defined but is left for judicial interpretation and definition. The rule of the *A. & P.* case supplies that definition for patents where the subject matter resides in a combination of old elements. Positively stated, the rule says that it is ordinary skill to unite elements having one function with elements having another function to produce a device having the combined function, and that to hold a patent for a combination of old elements valid, the Courts must find the old elements perform some new or different function in the combination than they perform out of it (340 U. S. 152).

Here the Eighth Circuit Court of Appeals, having unequivocally held the combination of the three known principles created no change in their respective functions, and being unable to find that anything which resulted from the application of more than mere mechanical ability was done or had to be done in combining the three principles (R. 607-608), properly decided that:

> "* * * Hence, we fail to find adequate evidentiary support for the trial court's finding of invention. The validity of the patent cannot be sustained under those circumstances" (R. 608).

CONCLUSION

The questions raised by the petition involve no substantial questions of law, no matter of great, or any, public importance, no conflict of decisions, no unsettled questions of law and no departure by the Court of Appeals from the accepted and usual course of judicial proceedings.

No question of any substance can arise from the erroneous dicta in the Court's opinion.

The petition is wholly without merit and should be denied.

Respectfully submitted,

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